No. 85-535

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IN THE

Supreme Court of the United States

October Term, 1985

QUINAULT INDIAN NATION, QUILEUTE INDIAN TRIBE, and HOH INDIAN TRIBE,

Petitioners,

v.

STATE OF WASHINGTON, et al.,

Respondents.

On Writ Of Certiorari To The United States Court of Appeals For The Ninth Circuit

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PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Does appellate jurisdiction exist to review an order approving an interim fish management plan when the district court did not direct entry of final judgment or certify its decision pursuant to Rule 54(b)?

2. Under the Treaty with the Quinault, 12 Stat. 971, may the State of Washington prevent treaty Indians from catching harvestable fish which a non-Indian sport fishery is incapable of harvesting?

PARTIES

Petitioners, Quinault Indian Nation, Quileute Indian Tribe, and Hoh Indian Tribe, together with the United States, appeared as appellees in the court of appeals. The State of Washington was the appellant below. These parties and the Washington Department of Fisheries participated in the district court proceeding initiated by the Department of Fisheries.

The United States and twenty Indian tribes are plaintiffs in the underlying district court action commenced in 1970 against the State of Washington and its Departments of Fisheries and Game. The twenty plaintiff tribes are the Quinault, Quileute, Hoh, Makah, Lummi, Muckleshoot, Squaxin, Skokomish, Lower Elwha, Stillaguamish, Sauk-Suiattle, Nisqually, Swinomish, Tulalip, Puyallup, Upper Skagit, Yakima, Nooksack, Port Gamble Band of Clallam, and Jamestown Clallam.

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NO._____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1985

QUINAULT INDIAN NATION, et al.,

Petitioners,

v.

STATE OF WASHINGTON, et al.,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioners, the Quinault Indian Nation, Quileute Indian Tribe, and Hoh Indian Tribe request that a writ of certiorari issue to review the questions presented by the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered in this case on May 28, 1985.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 761 F.2d 1404, and is attached as Appendix A. The unreported order of the District Court in this proceeding is attached as Appendix C.

JURISDICTION

The opinion of the Court of Appeals was entered on May 28, 1985. The petitioners herein filed a timely petition for rehearing which the Court of Appeals denied June 28, 1985. App. B-1. This Court has jurisdiction under 28 U.S.C. §1254(1).

FEDERAL RULE AND TREATY PROVISIONS INVOLVED

Federal Rule of Civil Procedure 54(b) reads:

> (b) Judgment Upon Multiple Claims or Involving Multiple Parties. When more than one claim for relief is presented in an action, whether as a claim, counterclaim, cross-claim, or third-party claim, or when multiple parties are involved, the court may direct the entry of a final judgment as to one or more but fewer than all of the claims or

> parties only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment. In the absence of such determination and direction, any order or other form of decision, however designated, which adjudicates fewer than all claims or the rights and liabilities of fewer than all the parties shall not terminate the action as to any of the claims or parties, and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims and rights and liabilities of all the parties.

Article 3 of the Treaty with the Quinault, July 1, 1855, 12 Stat. 971, reads:

> Art. 3. The right of taking fish at all usual and accustomed grounds and stations is secured to said Indians in common with all citizens of the Territory, and of erecting temporary houses for the purpose of curing the same; together with the privilege of hunting, gathering roots and berries, and pasturing their horses on all open and unclaimed lands. Provided however, that they shall not take shell fish from any beds staked or cultivated by citizens, and provided also, that they shall alter all stallions not intended for breeding, and shall keep up and confine the stallions themselves.

Similar provisions are contained in the Treaty of Medicine Creek, December 26, 1854, 10 Stat. 1132; the Treaty of Point Elliot,

January 22, 1855, 12 Stat. 927; the Treaty of Point No Point, January 26, 1855, 12 Stat. 933; the Treaty with the Makah, January 31, 1855; and, the Treaty with the Yakimas, June 9, 1855, 12 Stat. 951.

STATEMENT OF THE CASE

In 1970 the United States on its own behalf and as trustee for a number of Indian tribes filed an action against the State of Washington in which it asked the district court to construe and enforce the fishing rights clause of six Indian treaties concluded in the mid-1850's between the United States and Indian tribes in Washington Territory. Eventually 20 Indian tribes intervened as plaintiffs and the state Department of Fisheries and Department of Game intervened as separate defendants.

In 1974 the district court entered its landmark initial decision. United States v. Washington, 384 F.Supp. 312 (W.D.Wash. 1974) ("Final Decision No. I"), aff'd, 520 F.2d 676

(9th Cir. 1975), cert. denied, 423 U.S. 1023 (1976). Although this Court originally denied certiorari it subsequently reviewed the district court's initial decision in the context of appeals from various postjudgment enforcement orders,[1/] and substantially affirmed the district court in Washington v. Washington State Commercial Passenger Fishing Vessel Association, 443 U.S. 658 (1979).

This case represents one facet of this continuing litigation. It arose as the result of a conflict between petitioners ("Tribes") and the Washington Department of Fisheries ("State") over management of fall chinook originating in the Queets, Hoh, and

[1/] United States v. Washington, 459 F. Supp. 1020 (W.D. Wash. 1974-78) ("Post-Trial Decisions"), various appeals dismissed, 573 F.2d 1117 (9th Cir. 1978), 573 F.2d 1118 (9th Cir. 1978), 573 F.2d 1121 (9th Cir. 1978); decisions at 459 F.Supp. 1020, 1097-1118 (W.D.Wash. 1977-78), aff'd sub nom., Puget Sound Gillnetters Ass'n v. United States District Court, 573 F.2d 1123 (9th Cir. 1978), aff'd in part, vacated in part, and remanded sub nom., Washington v. Washington State Commercial Passenger Fishing Vessel Association, 443 U.S. 658 (1979).

Quillayute Rivers.[2/] [3/]

Initially the conflict took the form of a dispute over the proper spawning escapement policy for fall chinook on these rivers. The dispute was referred to the district court's

[2/] Each of these rivers flows into the Pacific Ocean on the west side of the Olympic Peninsula and is named after one of the Tribes, with the exception of the Queets which is named after the Queets Band, one of the original treaty signatories. The Queets are now a part of the Quinault Indian Nation. The Quinault Indian Reservation includes the mouth of the Queets River; the Hoh Reservation is located at the mouth of the Hoh River; the Quileute Reservation is located at the mouth of the Quillayute River. The location of each reservation was selected primarily to provide each of the Tribes a home including some of their principal fishing grounds. The Tribes have maintained villages at the mouth of each river and have relied for their survival on the adjacent river fisheries since time immemorial. Hoh Indian Tribe v. Baldrige, 522 F.Supp. 683 (W.D. Wash. 1981). United States v. Washington, 384 F.Supp. 312, 359, 371-75 (W.D.Wash. 1974).

[3/] These fish migrate to the ocean as juveniles. In the ocean they are harvested by predominantly non-Indian troll fisheries as they mature. The fish then return to the river of their origin at two to six years of age where they are harvested in a treaty Indian fishery on each of the petitioners' reservations and a non-Indian sport fishery in the upper portion of each river.

technical advisor who convened a meeting of the Fishery Advisory Board[4/] ("FAB") to review the dispute.

The technical advisor recommended an interim management plan and escapement policy designed to aid in gathering information necessary to determine the spawning escapement levels necessary to produce the maximum sustainable yield ("MSY"). The interim management plan provided for the harvest of 40% of the fall chinook returning each year allowing the escapement to vary with natural fluctuations in run size. Application of the recommended harvest rate management approach, however, was constrained by minimum spawning escapement levels established to ensure conservation of the

[4/] In 1975 the district court established a a Fishery Advisory Board chaired by the court's technical advisor (expert witness) "to advise the court on technical aspects of the case and make recommendations on questions of management and regulation of the resource." United States v. Washington, 459 F.Supp. 1020, 1061 (W.D.Wash. 1974-78).

resource. The data resulting from this plan would then be used to identify the spawning escapement level associated with the maximum sustainable harvest. App. A-3.

Allocation between the treaty and non-treaty fisheries was not a factor in the design of this plan in 1982, Id., for two reasons: (1) insufficient data to determine the extent of the ocean harvest from each of these runs, and (2) physical limitations on the ability of the non-Indian river sport fishery to harvest these fish resulting in extremely small harvests by the sport fishery. App. D-22. For these reasons allocation was handled in 1982 as in previous years by allocating to the sport fishery all of the fish it could reasonably be expected to harvest. The remaining harvestable fish were then to be taken by the treaty fisheries to insure implementation of the technical advisor's recommended harvest of 40% of the returning run. Although the State did not

cooperate in implementing the management plan in 1982, it did not challenge the management plan in the district court.

In 1983, however, the State objected to continued implementation of the management plan in this manner. The State's objection was based on a lengthy technical analysis of interceptions by the ocean troll fishery which it provided to the Tribes the working day before the FAB scheduled to consider implementation of the interim plan for the 1983 season. The State's analysis purported to show that the ocean fishery caught very few Queets, Hoh, and Quillayute fall chinook.

The state contended based on this analysis that the interim management plan would result in a tribal harvest in excess of 50% of the harvestable fish, if the Tribes were allowed to harvest the portion of the harvestable surplus which the sport fishery is unable to catch. As a matter of law the State argued under this Court's decision in

Washington v. Washington State Commercial Passenger Fishing Vessel Association, 443 U.S. 658 (1979), the Treaty fishery should be limited to a maximum of 50% of the available harvest even if the non-Indian fishery is not capable of catching the remainder.

The Tribes objected to the use of the state's analysis on the grounds that it was technically inadequate and that its presentation was untimely. The technical advisor upheld the tribal objection, and directed the parties to work to develop information on ocean interceptions for use in future years. 4/

4/ Shortly after the technical advisor issued his recommendation in this case the petitioner Tribes, together with all of the other plaintiff tribes invoked the district court's continuing jurisdiction, United States v. Washington, 384 F.Supp. 312, 408, 419 (W.D.Wash. 1974), seeking an accounting of non-Indian ocean interceptions. In this separate proceeding the Tribes contend that the State significantly undercounts the non-treaty ocean harvest. Subsequently, the State of Oregon intervened as a defendant and the (continued on next page)

The technical advisor further concluded that, given the inherent inefficiency of the non-Indian sport fishery, the large reductions in the treaty fishery sought by the State would at most result in only minimal increases in catch by the sport fishery. On the Queets for example, the advisor found that a reduction in the treaty harvest by 900 fish would result in only 22 more fish caught by the sport fishery and a spawning escapement of 878 fish more than required to fulfill the objectives of the management plan. 5/ App. D-6,7.

The advisor therefore recommended continued implementation of the interim plan.

(Footnote 4 continued from previous page) Warm Springs, Umattila, and Nez Perce Tribes intervened as plaintiffs. Trial in this proceeding has been continued on several occasions by agreement of the parties to allow for settlement discussions.

5/ The technical advisor's recommendation's are embodied in FAB Report Nos. 83-31, 83-33, and 83-35. No. 83-31 which addresses the Queets is attached as Appendix D. FAB Reports Nos. 83-33 and 83-35 are similar.

To insure that the plan did not adversely impact the sport fishery he also recommended that almost twice as many fish be reserved for the sport fishery as the state's best point estimate of its likely catch. App. D-8.

The State filed a request in the district court seeking review of the advisor's recommendations. The State sought a determination of the validity of the advisor's recommendations and a declaration of the parties' respective rights. After a trial de novo the district court by order of December 19, 1983 adopted the advisor's recommendations as an interim management plan. The district court's order did not dispose of the state's request for a declaration of the parties respective rights or adopt any separate findings of fact or conclusions of law.

In a separate continuing jurisdiction proceeding, however, involving tribes other

than petitioners, the district court on January 23, 1984 expressly ruled that a party may catch more than 50% of the harvestable fish, if such harvest does not significantly affect the other party's harvest, and the fish taken are surplus to spawning escapement needs. C.R. 9614. The State moved for certification of this latter ruling pursuant to 28 U.S.C §1292(b), and both the district court and court of appeals granted the necessary certification. The appeal in this related proceeding is presently pending in the court of appeals. United States v. Washington, C.A. No. 84-3769 (Argued and submitted January 18, 1985).

In this proceeding, however, the State filed a Notice of Appeal from the district court's December 19 order without seeking certification pursuant Rule 54(b) or 28 U.S.C. §1292(b). The Tribes therefore moved to dismiss the appeal in this case. App. B-2.

The court of appeals denied the Tribe's

Motion to Dismiss, holding that the district court's order was final and appealable. App. A and App. B-2. On the merits the court of appeals reversed the district court's approval of the advisor's recommendation by holding that the State has a right to allocate up to 50% of the harvestable fish to a sports fishery even when these fish cannot be harvested by the sport fishery, and will lead to an over-escapement.

REASONS FOR GRANTING THE WRIT

1. The Court Of Appeals Failure To Dismiss The Appeal From An Order For Which Certification By The District Court Pursuant To Rule 54(b) Had Not Been Sought Or Received Is Inconsistent With This Court's Decision In Curtis-Wright Corp. v. General Electric Co., 446 U.S. 1 (1980)

Federal Rule of Civil Procedure 54(b) allows a district court handling a case involving multiple claims or parties to enter an appealable final judgment as to fewer than all of the claims or parties. The district court is required to make two determinations under Rule 54(b). First it must determine that it is dealing with a "final judgment." Second, it must determine that there is no just reason for delay. In making the latter determination the district court must take into account judicial administrative interests militating against the possibility of piecemeal review, as well as the equities involved in allowing an immediate appeal. Curtis-Wright Corp v. General Electric Co.,

446 U.S. 1 (1946).

This Court has held that under this Rule the district court acts as a "dispatcher" determining "in the first instance, the appropriate time when each 'final decision' upon 'one or more but less than all' of the claims in a multiple claims action is ready for appeal." Sears, Roebuck & Co. v. Mackey, 351 U.S. 427, 435 (1956). "The timing of such a release is, with good reason, vested by the rule primarily in the discretion of the District Court as the one most likely to be familiar with the case and with any justifiable reason for delay." Id. at 437; see also Curtis-Wright Corp. v. General Electric Co., 446 U.S. 1, 12 (1980).

In Curtis-Wright, supra, these considerations led the Court to hold that a "reviewing court should disturb the trial court's assessment of the equities only if it can say that the judge's conclusion was clearly unreasonable." Id. at 10.

Accordingly, the court of appeals role in reviewing the district court's exercise of discretion under Rule 54(b) is relatively limited.

In this case the district court was not requested by the State to certify its order pursuant to Rule 54(b), cf. Curtis-Wright, supra, at 4, and the district court did not direct the entry of judgment or make the certification that the rule requires. When the Tribes moved to dismiss the appeal, however, the court of appeals, rather than dismissing the appeal and remanding to the district court for a determination under Rule 54(b), undertook the analysis required of the trial court by the rule. In so doing it usurped the district court's function under Rule 54(b). 6/

6/ This case demonstrates the reasons for requiring that the district court, in the first instance, consider whether or not "there is just reason for delay." Given the pendancy of related proceedings, the record of which was not before the court of appeals, (continued on next page)

While it may be, as the court of appeals suggests, that a more lenient test is to be applied in the case of a post-judgment order, the appellate court fails to explain why this test should not be applied in the first instance by the district court as required by this Court's decisions. Indeed, in a case such as United States v. Washington, where the district court has maintained continuing jurisdiction for the life of the decree, most of the same considerations are present as in

(footnote 6 continued from previous page) the district court was clearly in a better position to consider the factors contributing to a Rule 54(b) determination. See Cold Metal Process Co. v. United Engineering & Foundary Co., 351 U.S. 445, 452 (1951). One of these other proceedings deals with contested issues relating to accounting for ocean harvest which is central to the state's assertion that the advisor's plan allows the Tribes to harvest more than 50% of the harvestable fish. There is therefore is reason to believe that the district court would have found that its order was not yet ripe for appellate review.

the more typical case of a pre-judgment order. 7/

In Sears and Curtis-Wright, supra this Court examined the standard of review of a district court's certification under Rule 54(b). The Court has never addressed the scope of an appellate court's authority when the district court has failed, or declined to make the required certification. That question should be addressed here to prevent usurpation of the district court's role, and needless premature appeals.

7/ There are presently at least 10 separate proceedings pending before the district court in United States v. Washington, including as indicated, infra, two proceedings which are related to this proceeding. Moreover the dangers of piecemeal review are very real in a case such as this. In 1985 alone, for example, the Court of Appeals decided 4 separate and independent appeals in United States v. Washington, and 3 more appeals remain pending.

2. The Court Of Appeals Decision Is Inconsistent With Decisions Of This Court Holding That Off-Reservation Treaty Fisheries Of The Petitioner Tribes May Be Limited Only To Insure Conservation Of Fish Runs And To Provide Non-Indian Fishers With An Opportunity To Take A Fair Share Of The Harvest

In Washington v. Washington Commercial Passenger Fishing Vessel Association, 443 U.S. 658, 685-86 (1979), this Court held that the treaty involved in this case secures to both the Tribes and State "the right to take a fair share of the fish." The Court went on to uphold the 50-50 allocation decreed by the district court in Final Decision No. I holding that 50% is the maximum treaty Indian allocation. Passenger Fishing Vessel, supra, at 686.

Both Passenger Fishing Vessel and the earlier Puyallup cases, Puyallup Tribe v. Washington Game Dept., 391 U.S. 392 (1968); Washington Game Dept. v. Puyallup Tribe, 414 U.S. 44 (1973); Puyallup Tribe v. Washington Game Dept., 433 U.S. 165 (1977), arose in a

context in which both sides were capable of harvesting more than 50% of the available fish. Recognizing this limitation the court of appeals held that the 50% maximum allocation language of Passenger Fishing Vessel, supra, should be viewed in this context, where both the treaty and non-treaty fishers are capable of taking their full 50% allocation. The appeals court went on to rule that where one party is unable to take its allocation, the other party should be able to take the otherwise unharvested share unless doing so would interfere with conservation. In sum the court of appeals ruled "the 50% figure should be viewed as a ceiling only when there is actual competition for the resource."

The court of appeals, however, did not end its analysis there. It went on to hold that the State is exercising its right under the Treaty to fish in common when it allocates its 50% share to a sport fishery

which the State acknowledges is incapable of harvesting the fish allocated to it.

It is this latter holding which the Tribes believe conflicts with this Court's prior decisions. The decisions in Passenger Fishing Vessel and the Puyallup cases clearly hold that treaty Indian fisheries may be limited for only two reasons: 1) to conserve the resource; and, 2) to provide non-Indians with an opportunity to harvest a fair share of the harvest.

This case does not meet either of these criteria. There is no conservation issue, and the management plans approved by the district court provide the non-Indian sport fishery with an opportunity to harvest more fish than the State estimated that fishery is capable of harvesting. To the extent that the non-Indian fishery may hypothetically experience a minimal reduction in catch the court's technical advisor found the reduction to be the result of the sport fisheries

"inherent inefficiency" rather than preemption by the treaty Indian fishery. App. at D-7.

Not only does the court of appeals holding, which protects the sports fishery's opportunity to try to catch fish which that fishery is incapable of catching, go beyond prior holdings of this Court in limiting the treaty Indian fishery, it is inconsistent with the language of the treaty which secures the right to "take" fish. Noting this language in Passenger Fishing Vessel, supra, at 685 the Court held that the treaty right secured is "the right to 'take'--rather than merely the 'opportunity' to catch" available fish."

8/ Indeed the analysis of the court of appeals which in effect gives the state ownership of fish which its fishers are incapable of harvesting is also inconsistent with this Court's holdings in Hughes v. Oklahoma, 441 U.S. 322 (1979) and Douglas v. Seacoast Products, Inc., 431 U.S. 265 (1977).

In Final Decision No. I the district court found that:

> The anadromous fishery resource is both perishable and renewable. Thus, while an over-harvest would impair its renewability, an under-harvest during the limited time it is available would result in an irreplaceable waste of the resource. In addition to being wasteful, over-escapement of fish on the spawning ground can impair the renewability of the resource....

United States v. Washington, 384 F.Supp. 312, 384 (W.D.Wash. 1974).

> Wastage of fish and potential harm to other species and to the spawning stock of the same species may occur as a result of overescapement of salmon at spawning grounds. The Department of Fisheries believes that it is not properly managing the salmon resource if fish in excess of the number needed for spawning escape to the spawning ground.

Id. at 390.

This Court acknowledged these principles must be taken into account in implementing the parties rights under the treaty in its 1979 decision when it cited the above quoted findings and declared:

> Adequate regulations must not only take into acccount the potentially conflicting

> interests of sport and commercial fishermen, as well as those of Indian and non-treaty fishermen, but also must recognize that fish runs may be harmed by harvesting either too many or too few of the fish returning to spawn.

Washington v. Washington Commercial Passenger Fishing Vessel Ass'n, 443 U.S. 658, 663-64 (1979).

The rules for implementing the treaty fishing rights declared by the district court have consistently implemented this principle. For example, the Order for Program to Implement Interim Plan, United States v. Washington, 459 F.Supp. 1020, 1036 is careful to allow limitations on treaty or non-treaty fishing only when:

> ...such closure or curtailment will (1) increase the opportunity of the other fishery (i.e., non-Indian or Indian, respectively) to take more of the harvestable portion of such run, and (2) not result in overescapement for such run....

Other orders implement this same principle that a party unable or unwilling to harvest its full share should not expect the other

party to allow the available surplus to go unharvested. See e.g. Id. at 1069, 1071 and 1086.

Although the court of appeals recognized this policy against wastage the court departed from it in holding that the treaty secures to the State the right to allocate to a sports fishery more fish than it can harvest. This is surely inconsistent with the understanding of the Tribe's forefathers who signed the treaty with no understanding that their harvest of fish would be limited for any reason, Passenger Fishing Vessel, supra at 668, let alone to provide a non-Indian sport fishery with more fish than it is able to harvest.

This Court should grant certiorari to review this holding of the court of appeals which limits the Tribe's treaty secured right to take fish for reasons other than conservation or allocation of fish for harvest by non-treaty fishers.

CONCLUSION

The court of appeals decision to hear the State's appeal, notwithstanding the absence of certification pursuant to Rule 54(b), usurped the role of the district court under that rule contrary to the decisions of this Court in Sears and Curtis-Wright, supra. The court of appeals decision diminishes the Tribes' treaty fishing right by allowing the State to prevent the Tribes from taking harvestable fish not needed for conservation or harvest by non-Indians. That decision should be reversed.

Respectfully submitted,

Richard Reich
Attorney for Petitioner
Quinault Nation

Susan Kay Hvalsoe
Attorney for Petitioners
Quileute and Hoh Tribes

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, et al.,
Plaintiff-Appellee,

and

QUINAULT INDIAN TRIBE, et al.,
Plaintiff-Intervenors-Appellees,

v.

STATE OF WASHINGTON,
Defendant-Appellant.

No. 84-3571
D.C. No.
CV 9213—Phase I
OPINION

Argued and Submitted
January 18, 1985—Seattle, Washington

Filed May 28, 1985

Appeal from the United States District Court
for the Western District of Washington
Walter E. Craig, Senior District Judge, Presiding

SUMMARY

When the State has decided to dedicate its share of the fishery resource to recreational fishers, it is exercising its right to fish in common with the Treaty fishers.

The district court's underlying decision in this case apportioned the opportunity to catch fish 50-50 between the Indian tribes and non-Indians. In this appeal, the State of Washington contends that the district court Fishery Advisory Board's (FAB) interim plan for determining escapement levels, which adopts a fixed catch-rate of 40% of the run, and the court technical advisor's recommendation that fish determined to be unharvestable by one party must be available for harvest by the other party, authorize a tribal catch exceeding its 50% allocation.

[1] Section 1291 of Title 28 gives a right of appeal from all final decisions of the district court. [2] Because there is little danger of piecemeal review and because this is the only opportunity for meaningful review, the district court's post-judgment order should be treated as an appealable final order.

[3] The "maximum allocation" language in previous cases indicating that 50% is a maximum cap on the Indian treaty right should be read in the context where each party is capable of taking its full allocation. [4] Although each party is entitled to 50% of the shared fishery resource, the 50% figure should be viewed as a ceiling only when there is actual competition for the use of the resource.

[5] When the state has decided to dedicate its share of the fishery resource to recreational fishers, it is exercising its right to fish in common with the treaty fishers. Thus, the treaty fishers may not infringe on this right by catching more than 50% of a given run when, as here, the tribal fishery is first in place and time.

Reversed and remanded.

COUNSEL

Dennis Reynolds, Assistant Attorney General, Olympia, Washington, for the defendant-appellant.

Donald T. Hornstein, Department of Justice, Land and Natural Resources Division, Washington, D.C.; Cullen, Holm, Hoglund & Foster and Susan K. Hvalsoe, Olympia, Washington, for the plaintiffs-appellees.

OPINION

Before: WRIGHT and TANG, Circuit Judges, and HENDERSON,* District Judge.

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*Of the Northern District of California.

WRIGHT, Circuit Judge:

We must again resolve a dispute arising from the district court's continuing jurisdiction in the Northwest Indian Fisheries litigation. The district court's initial decision apportioning the opportunity to catch fish 50-50 between the Indian tribes and non-Indians is reported in *United States v. Washington*, 384 F. Supp. 312 (W.D. Wash. 1974) (*Boldt I*), *aff'd*, 520 F.2d 676 (9th Cir. 1975), *cert. denied*, 423 U.S. 1086 (1976).

FACTS

The issues presented on this appeal are tied to the question of salmon escapement on the Queets, Hoh, and Quillayute Rivers in northwestern Washington. In 1982 and 1983, the district court's Fishery Advisory Board (FAB)[1] considered a dispute over the appropriate number of all Chinook that should be allowed to escape the in-river fisheries and spawn. The Tribes argued that fewer spawners were necessary to produce a Maximum Sustained Yield (MSY) than the number of spawners insisted upon by the state.

In 1982, the FAB developed an interim, data-gathering or "probing plan" to aid in determining the escapement levels necessary to sustain optimum yield. FAB 82-21. Under the plan, a fixed catch-rate of 40% of the run was adopted. As fish density varies from year to year, the fixed exploitation rate was designed to produce a varying range of actual numbers of spawners. These data would then be used by resource managers to determine the escapement levels necessary to achieve MSY.

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[1]The FAB was established by the district court's order of October 28, 1975, 459 F. Supp. 1020, 1061 (W.D. Wash. 1978), *aff'd*, 645 F.2d 749 (9th Cir. 1981). The Board consists of three members, one selected by the Treaty Tribes, one by the State of Washington, and the court's technical advisor, serving as the non-voting chairperson. *Id.* If the parties are unable to resolve a dispute, upon request the technical advisor "shall . . . report to the court and all parties, his analysis of the matters discussed in the Board meeting and recommendations, if any". *Id.* at 1062. Either party may then submit a request for review of the recommendation in the district court. *Boldt I*, 384 F. Supp. at 419 (Injunction ¶ 25).

This fixed-rate exploitation plan was developed without State cooperation, and the State did not challenge the approach in district court. The allocation between Indian and non-Indian fisheries within the 40% exploitation rate was not, however, a factor in the 1982 plan.

In 1983, the court's technical advisor issued a series of separate recommendations for the fall Chinook season on the Queets, Hoh and Quillayute Rivers. FAB Nos. 83-31, 83-33, 83-35. The recommendations concluded that to effectively probe optimum yield, fish determined to be unharvestable by one party must be available for harvest by the other party in order to assure a fixed catch. The advisor noted that the State's claimed right to assign part of its allocation to non-harvest recreational uses would result in exploitation of less than 40% of the run, thereby undermining the FAB's probing plan.

This results from the nature and location of the fisheries. The State hook and line sports fishery is located upstream from the tribal commercial net fishery. Thus, harvestable fish not caught by the sports fishery necessarily result in greater escapement, undermining the fixed catch goal.

Subsequently, the State filed a request for review of the recommendation in the district court. The State's primary objection was that the interim plan would authorize a tribal catch exceeding its 50% allocation. The State argued that the plan would infringe its opportunity to catch 50% of the harvestable run since a greater tribal catch necessarily reduces the number of fish available to the sports fishery. The district court adopted the advisor's recommendation over these objections by order on December 19, 1983. This appeal followed.

ANALYSIS

I. *Appealability*

The district court adopted the FAB plan by order without certifying its order appealable under Fed. R. Civ. P. 54(b) or 28

U.S.C. § 1292(b). The State challenges it as allegedly impairing the State's equal opportunity to catch available fish. The Tribes argue that the district court order is not final and appealable.

[1] Section 1291 of Title 28 gives a right of appeal "from all final decisions" of the district courts. The Supreme Court has identified the policy behind the finality doctrine:

> A "final decision" generally is one which ends the litigation on the merits and leaves nothing for the court to do but execute the judgment. . . . The foundation of this policy is not in merely technical conceptions of "finality." It is one against piecemeal litigation.

Catlin v. United States, 324 U.S. 229, 233-34 (1945). It is sometimes appropriate to give the finality requirement a practical rather than a technical construction. *Firestone Tire & Rubber Co. v. Risjord*, 449 U.S. 368, 375 (1981). *See In Re Coordinated Pretrial Proceedings*, 747 F.2d 1303, 1305 (9th Cir. 1984). "[F]inal . . . does not necessarily mean the last order possible to be made in a case." *Gillespie v. United States Steel Corp.*, 379 U.S. 148, 152 (1964).

This is particularly true when post-judgment orders are involved. The policy against and the probability of piecemeal review is not as decisive a consideration after judgment as before judgment since the underlying dispute is already settled. *See, e.g.*, 15 C. Wright, A. Miller, & E. Cooper, *Federal Practice and Procedure*, § 3916 at 606 (1976); *Joseph F. Hughes & Co. v. United Plumbing and Heating, Inc.*, 390 F.2d 629, 630 (6th Cir. 1968) (per curiam); *cf. Kittitas Reclamation District v. Sunnyside Valley Irrigation District*, 626 F.2d 95 (9th Cir. 1980), *cert. denied*, 449 U.S. 1079 (1981) (finality rule does not bar appellate review of orders issued pursuant to district court's continuing jurisdiction over consent decree in water rights case). Moreover, unless such orders are found final, there is often little prospect that further proceedings will occur to make them final. 15 C. Wright, A. Miller & E. Cooper, *supra*, at 607. *See also Sport-Mart, Inc. v. Wolverine World Wide, Inc.*, 601 F.2d 313, 316 (7th Cir. 1979).

The Tribes first argue that the district court did not dispose of the allocation issues raised by the State in its request for review. By adopting an interim plan contrary to allocation principles urged by the State, the district court effectively rejected the State's primary contention. Although the court did not join the State in characterizing those proceedings as an allocation dispute, implicit in its decision is the determination that the State's entitlement does not limit the tribal catch to 50% of the available run.

The Tribes next contend that the five-year plan is of an interim nature only, and should not be considered final. This view, however, would eliminate any opportunity for review since by definition the plan will always be "interim." The potential that the State's treaty rights will be infringed by the plan over a five-year period weighs in favor of considering the order final and appealable.

We reject the Tribe's assertion that there are no factual or legal findings to be reviewed on appeal. First, the district court adopted the FAB reports in its order. These reports constitute the findings of the court under Federal Rule of Civil Procedure 52(a). In addition, the district court's order resolves the legal issues underlying the plan, leaving only factual determinations regarding yearly implementation to be determined.

The United States argues that because the factual record is rooted in 1983, this appeal is moot. The district court's decision, however, not only adopted the factual findings relevant to 1983, it implemented an interim plan which would allow the tribal catch to exceed 50% of the available fish if the non-treaty fishers were unable to harvest their full share. This aspect of the plan will apply throughout its five-year life, and does not depend on annual data. To decline review on this basis would create a situation guaranteed to repeat yet evade review. *See United States v. Oregon*, 718 F.2d 299, 302 (9th Cir. 1983).

At oral argument, the United States emphasized the lack of accurate data on prior ocean interceptions. This, the government

argued, precludes the state from asserting that the plan allows the tribal share to exceed 50% of the harvestable fish.[2] However, the parties and the FAB have proceeded upon the assumption that the tribal catch would exceed 50% since the projected in-river sport catch was so low. *See* FAB 82-31 at 7. We believe it highly improbable that ocean interception data will alter the allocation substantially enough to reduce the tribal catch to less than 50%. We decline to deny review here in anticipation of further clarification of these figures at some indefinite future date.

[2] We conclude that, because there is little danger of piecemeal review and because this is the only opportunity for meaningful review, we shall treat the district court's post-judgment order as an appealable final order.

II. *Allocation*

The district court adopted the FAB's interim plan designed to gather information necessary for determining optimum yield. Under the plan, the Tribes were allowed to exceed their 50% allocation to harvest fish determined to be unharvestable by the sports fishery. The State contends that experimenting with harvest rates by allowing a larger tribal catch violates the State's treaty-secured opportunity to take 50% of the available harvest.

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[2]Following are the State's estimated figures for 1983, comparing the allocation of harvestable fish under the plan versus a 50% allocation:

	Quillayute	Hoh	Queets
50% tribal share*	1,921	1,004	1,266
50% non-Indian share*	1,599	836	1,054
Tribal share under FAB recommendation	2,770(71%)**	1,440(71%)**	2,120(83%)**
Non-Indian share under FAB recommendation	750(29%)**	400(29%)**	200(17%)**

* Adjusted for ocean interceptions.

** Percentage of harvestable share.

The Tribe disputed the State's estimate of prior ocean interception but the parties agreed resolution of this dispute was not necessary for resolution of the instant dispute. FAB 83-31 at p. 7.

A. *Background*

In 1854 and 1855, "Isaac Stevens, the first Governor and first Superintendent of Indian Affairs of the Washington Territory, and a small group of advisers," negotiated a series of treaties (Stevens Treaties) with Indian tribes then occupying the Pacific Northwest. *Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658, 666 (1979) (*Fishing Vessel*). These treaties "extinguish[ed] the last group of conflicting claims to lands lying west of the Cascade Mountains and north of the Columbia River in what is now the State of Washington." *Id.* at 661.

The Stevens Treaties reserved to the Indians a "right of taking fish." The pertinent language provides:

> "The right of taking fish, at all usual and accustomed grounds and stations, is further secured to said Indians, *in common with* all citizens of the Territory. . . ."[3]

"In common with" has been interpreted to mean that both treaty and non-treaty fishers shall have the opportunity to take up to 50% of the available run. *United States v. Washington*, 384 F. Supp. at 343. We employed a co-tenancy analogy in upholding the 50-50 split. *United States v. Washington*, 520 F.2d 676, 685 (9th Cir. 1975).[4]

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[3]The language is quoted from Article III of the Treaty of Medicine Creek, 10 Stat. 1133 (emphasis added) (*reprinted in Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658, 674 (1979)), and is typical of these treaty provisions.

[4]For a more exhaustive treatment of the historical background and judicial history of this clause, *see generally* Cohen, *Handbook of Federal Indian Law*, 453-455 (1982 ed.); Comment, *Indian Treaty Analysis and Off-Reservation Fishing Rights: A Case Study*, 51 Wash. L. Rev. 61 (1975); Note *Fishing Vessel Association: Resolution of Indian Fishing Rights Under Northwest Treaties*, 16 Willamette L.J. 931 (1980).

B. *Tribal Catch Limitations*

The State first contends that the "in common with" language of the Stevens Treaties does not allow the tribal catch to exceed 50% of the harvestable fish, relying on *Fishing Vessel*. Resolution of this issue requires interpretation of the Treaties and is reviewable *de novo*.

In *Fishing Vessel*, the Supreme Court held that "while the maximum possible allocation to the Indians is fixed at 50%, the minimum is not; the latter will upon proper submission to the district court, be modified in response to changing circumstances." 443 U.S. at 686-67 (footnote omitted). We have, in subsequent cases, also referred to the 50% allocation in terms that suggest a maximum cap on the Indians' treaty right. *See, e.g., United States v. Washington*, No. 81-3111, slip op. at 12 (9th Cir. April 29, 1985) (en banc); *United States v. Lower Elwha Tribe*, 642 F.2d 1141, 1142 (9th Cir.), *cert. denied*, 454 U.S. 862 (1981). The State argues that this language precludes the district court from allowing any tribal catch to exceed 50% of the harvestable run. However, this language should not be taken out of context and applied in a manner inconsistent with previously developed sharing principles.

[3] Unlike the present case, *Fishing Vessel* did not involve a situation where the non-treaty fishery was harvesting less than its full allocation. The "maximum allocation" language should be viewed as addressing a context where each party is capable of taking its full allocation. Indeed, in *Fishing Vessel* the Court also indicated that the 50% ceiling was logically related to the parties' treatment of each other as equals. 443 U.S. at 686 n.27; *see also United States v. Washington*, 384 F. Supp. at 343 (" 'in common with' means *sharing equally* the opportunity to take fish"); *United States v. Washington*, 520 F.2d at 685 (referring to Indians and non-treaty fishers as "co-tenants"). Thus, since the Indians' allocation may be reduced for lack of use, equality requires applying the same principles to the non-treaty fishery.

This interpretation is also consistent with our co-tenancy analysis in *United States v. Washington*, 520 F.2d at 676. Under

property principles, each co-tenant has a right to full use of the property limited only by the other tenant's equal right to such use. *See* Comment, *The Inter Vivos Rights of Cotenants Inter Se*, 37 Wash. L. Rev. 70, 76 (1962). By analogy, if the non-treaty fishers should choose not to use their share of the resource, the Indians should be permitted to take the otherwise unharvestable portion unless doing so would interfere with conservation. *Cf. United States v. Washington*, 520 F.2d at 685.

[4] In sum, although each party is entitled to 50% of the shared fishery resource, the 50% figure should be viewed as a ceiling only when there is actual competition for use of the resource. Whether the State's non-harvest use of the resource is a use of the type protected from infringement will be developed more fully below.

C. *Non-Harvest Uses*

The FAB concluded that the fixed catch methodology would "reduce the number of fish available for sport fishermen." FAB 83-31 at 2. However, because the estimated resultant decrease in sport catch was minimal compared with the tribal loss, *e.g.*, *id.* (estimated "22 fish sport loss/900 fish tribal loss for Queets River), FAB 83-33 at 2 (estimated "32 fish sport loss/555 fish tribal loss for Hoh River), the plan was approved.[5]

The question becomes whether this reduction in the sport catch, albeit slight, infringes upon the State's treaty rights. We review this issue, which is not "essentially factual" but primarily one of treaty interpretation, *de novo*. *United States v. Washington*, 730 F.2d 1314, 1317 (9th Cir. 1984) (citing *United States v. McConney*, 728 F.2d 1195, 1201-1203 (9th Cir.) (en banc), *cert. denied*, 105 S.Ct. 101 (1984)).

The State argues that its decision to allow its share of harvestable fish to be taken by a relatively inefficient sports fishery, nec-

[5]Numerical details were unavailable for the Quillayute River, but the FAB said its reasons for approving the fixed catch implementation were "similar in principle to those given for the Queets and Hoh Rivers in FAB 83-31 and 33." FAB 83-35 at 2.

essarily allowing a greater escapement, is a wise use of its share of the harvestable run and is protected by the Treaty from diminution. The Tribes counter with the argument that the policy against waste of harvestable fish overrides the State's interest. The parties' contrasting positions raise the issue whether yield management of a common resource warrants infringement on one party's non-harvest decision.

Waste of harvestable fish should be avoided. *Fishing Vessel*, 443 U.S. at 663-64. In the present case the FAB plan is designed to probe for the harvest level which will minimize waste. Thus, the Tribes' contention that the State's non-harvest-use is waste is premature. However, the general policy against waste does weigh in favor of such a maximum harvest probing plan.

The policy against waste, however, must give way to the State's right to dedicate a portion of its allocation to the inefficient sports fishery, resulting in a greater escapement, if the right is protected by treaty. *See United States v. Oregon*, 718 F.2d 299, 305 (9th Cir. 1983) (neither party should be forced to pay too high a price in the name of maximizing yield).

[5] The goal of the sports fishery is to provide a sustained recreational experience. *United States v. Washington*, 384 F. Supp. at 383. Yet the policy against waste emphasizes catch, which is not the primary goal of the sports fishery.[6] The State argues that exercise of the opportunity to catch, not harvest, should determine the extent of the right for the sports fishery. We agree that, when the State has decided to dedicate its share of the fishery resource to recreational fishers, it is exercising its right to fish in common with the Treaty fishers. This gives rise to the 50/50 sharing principles first enunciated in the *Boldt I* decision. The Treaty fishers may not infringe on this right by catching more than 50% of a given run when, as here, the tribal fishery is first in place and time.

[6]For instance, many sport fishers consider the act of catching the fish the primary goal and generally throw the fish back rather than harvest it. *See, e.g.*, Affidavit of Carl Burke, E/R 131.

CONCLUSION

On remand, if the parties fail to agree, the district court with aid of the FAB must develop a plan that provides necessary data without infringing upon either party's treaty rights. The plan must respect the State's right to allocate up to 50% of any harvestable run to the sports fishery without diminution for failure to harvest all available fish.

This judgment is to operate prospectively. The parties have, in good faith, relied upon the prior decisions of the FAB and the district court, and retroactive application would work substantial hardship upon the Indian fishers. *See McNaughton v. Dillingham Corp.*, 722 F.2d 1459, 1460-61 (9th Cir.), *cert. denied*, 105 S. Ct. 291 (1984).

This dispute should have been resolved through cooperation, not litigation. Both parties seek maximum utilization of the resource. This goal will be reached only when the parties work together in harmony, not discord.

REVERSED AND REMANDED.

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UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, et al.,	)	
Plantiff-Appellee,	)	No. 84-3571
and	)	DC# CV 9213
QUINAULT INDIAN TRIBE, et al.,	)	ORDER
Plaintiff-Intervenor-Appellees	)	
vs.	)	
STATE OF WASHINGTON,	)	
Defendant-Appellant	)	

Before: WRIGHT and TANG, Circuit Judges, and HENDERSON, District Judge

The Petition for Rehearing filed on June 10, 1985 has been considered and is denied.

[Filed June 28, 1985.]

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plantiff/Appellee, and QUINAULT INDIAN TRIBE, et al., Plaintiff/Intervenor/ Appellees vs. STATE OF WASHINGTON, Defendant/Appellant	No. 84-3571 DC# CV-9213 WEC Western Washington (Seattle) ORDER
In Re: STATE OF WASHINGTON'S REQUEST FOR DETERMINATION OF NORTH COASTAL FALL CHINOOK MANAGEMENT	

Before: CHOY AND GOODWIN, Circuit Judges

Appellees' motion to dismiss the appeal for lack of jurisdiction is denied. The parties shall address the question of the court's jurisdiction in their briefs.

Appellees shall file their brief within twenty-one (21) days of the entry of this order.

[Filed June 5, 1984.]

IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WASHINGTON

UNITED STATES OF AMERICA, et al.,	)	
	)	Civ. No. 9213
Plaintiffs,	)	Phase I
	)	
v.	)	ORDER Re: State of Washington's
STATE OF WASHINGTON, et al.,	)	Request for Determination of North Coastal Fall Chinook Management
Defendants.	)	

This Court, having reviewed all pertinent pleadings and having heard argument on this matter, December 15 and 16, 1983, in Seattle, Washington, concludes as follows.

IT IS ORDERED that this Court adopts the recommendation of the Court's technical advisor, Mr. Harrt, in reference to the fall chinook management on the Queets, Hoh, and Quillayute River systems. This recommendation is embodied in F.A.B. Reports No. 82-21, No. 83-31, No. 83-33, and No. 83-35. This interim management plan shall operate with the estimate of sports catch(es)

to be determined by a technical meeting, of all the parties, each year. If no estimate is agreed upon at the technical meeting, the estimate will be determined by F.A.B. recommendation.

It shall be noted that this order applies only to fall chinook in the Queets, Hoh, and Quillayute rivers.

Dated at Phoenix, Arizona, this 19th day of December, 1983.

s/

Walter E. Craig
United States
District Judge

[Filed December 21, 1983.]

FAB 83-31

Held August 29, 30, 1983

Final Draft sent 10/14/83

TO: The Honorable Walter E. Craig

FROM: Allan C. Hartt, Co-chairman (pro tem)

SUBJECT: Queets River Fall Chinook Management

ISSUES: The major issue was the appropriate sharing of the harvestable fall chinook salmon under the 0.4 harvest rate which was agreed by the parties in technical session pursuant to the management methodology recommended in FAB 82-21. The State position was that their proposed plan constituted a probing strategy that met probing objectives, plus equal sharing; i.e., that each party was limited by law to a maximum 50% share of the harvestable number and that, under a wise-use concept, the 0.4 harvest rate could be decreased, and the escapement increased, to the degree that the

non-Indian river sport fishery may be unable to harvest its share. The State qualified this position however, in stating that the appropriate steps for setting allocation and for subsequent management were:

1. A joint technical review team needs to be appointed to try to come to agreement on the Chinook Allocation Model or, failing agreement, for the FAB to recommend on the matter.

2. The allocation resulting from this process will then be used to set the shares within the 0.4 harvestable number of the in-river run for 1983 and subsequent years, subject to review and updating as new data and analyses may indicate.

3. Following the above, the appropriateness of the Tribe's applying for all, or a portion of the non-Indian share can be addressed through the FAB and to the court if necessary.

4. The State cannot now categorically approve or oppose such application for transfer of shares, but will consider each case on its own merits.

5. With these items determined, the Tribe can then appropriately adjust their fishery in the context of their objective of a chinook-directed fishery.

The Tribal position was that the 0.4 harvest rate, with a 0.5 escapement, was an essential part of an agreed management plan for probing for MSY escapement, and that within the 0.4 rate, fish determined unharvestable by one party legally may be harvested by the other. The Tribe further believes that a State/Tribal agreement, or an FAB-recommended interception rate per the Chinook Allocation Model was not essential for a resolution of the main issue, but the Tribe did agree to use the Model's estimate of Queets fish for 1983 for illustrative purposes at this FAB.

Other issues were:

2 - Under the State management rationale, any disparity between State and Tribal forecasts of hatchery chinook must be applied in re-calculating allocation shares. Under the Tribal rationale, the disparity is moot at present since the harvest of hatchery chinook is only incidental to harvest of wild chinook.

3 - State methods for projecting sport catches for 1983 were not accepted by the Tribe.

4 - Mixed-stock criteria for allowable impact on non-target species were not agreed.

RESULTS: The parties, being unable to reach agreement, requested recommendations from the Chairman, which are as follows:

Issue 1 - Based upon the technical data presented by both parties at this FAB, and consistent with the Tribal rationale for a harvest rate of 0.4 in FAB 83-21, I recommend that the 0.4 harvest rate be

construed and implemented per the Tribal rationale. This recommendation implies also that I concur with the Tribal view that agreement on the Chinook Allocation Model need not be final for in-river management purposes in 1983. However, I do concur with the State's motion that steps be taken in a scheduled and timely manner to reconcile State/Tribal differences regarding this potentially essential management tool.

Reasons for the above recommendation are:

a. A harvest rate of 0.4 and "floor" escapement of 2,500 fall chinook is an integral part of a management plan which protects the resource and effectively probes toward MSY escapement.

b. This harvest rate is conservative, being the lower figure of the 0.4-0.45 range which was recommended in FAB 82-21. Further, the floor escapement value is conservative,

being the upper figure of the 2200-2500 range recommended in FAB 82-21.

c. Given a 5,500 predicted run size of wild fall chinook in 1983, the projected escapement is 3,300 fish, or 800 fish above the floor value of 2,500.

d. Escapements in 1981 and 1982 were 4,300 and 4,200 fish respectively, equalling or exceeding the State's preferred fixed-point goal, so that the expected 1983 escapement of 3,300 will provide a needed data point in the probing range. The State plan would result in another escapement in the 4,200 fish range.

e. Although the Tribal plan will reduce the number of fish available for sport fishermen, the numerical reduction in the sport catch will be minimal compared to the loss to Tribal fishermen under the State plan (22 fish sport loss/900 fish Tribal loss). In this regard it is noted that the State has

taken measures to increase the sport catch in 1983, but because of the inherent inefficiency of the sport fishery for fall chinooks in the Queets River, there is little possibility for appreciable increase in the sport catch under either plan.

f. The State's view that wastage will not result from their plan to increase the escapement above the 0.6 level is valid only if the ultimately-determined MSY escapement proves to be nearer the State's estimate than to the Tribe's estimate (4,200 vs. 2,200). Since MSY escapement has not been determined, wastage could be occurring at any level within the range of probing. Tribal analyses referenced in FAB 82-21, based on admittedly limited data show that MSY could be less than the floor. State analyses, referenced at the same FAB, show that MSY could lie at levels well above the previous State objective of 4,200. Thus, with respect to risk of wastage, it is reasonable to allow the annual

escapement to be a function of run size and a fixed harvest rate, and as return runs occur, the cumulative data should begin to show empirically the appropriate direction for probing.

Issue 2 - This matter becomes moot for 1983 in view of my recommendation on Issue 1.

Issue 3 - The Tribe agreed to accept the State's sport catch projection for 1983, including a maximum upper likelihood of 200 adult chinook.[1] Note that the estimate of the sport catch in future years will become

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[1] Following the FAB, the State calculated the 1983 Queets River sport catch of adult chinook as follows:

	Point estimate	Range at 95% C.I.
Using 1978-81 $\bar{X}$ catch rate -	58	0-144
Using doubled 1978-81 rate in view of liberalized regs. -	116	0-286

more reliable as experience is gained under the State's proposed liberalized regulations if run strengths permit.

Issue 4 - Since the two parties had come to agreement on criteria for coho/chinook mixed-stock management earlier at FAB 83-30 (Queets coho management), it was not dealt with herein, except that the Chairman's recommendation regarding Issue 1 will require appropriate budgeting of coho impact during any additional Tribal chinook fishing.

SUMMARY OF MEETING.

FAB 83-31 was held at the School of Fisheries, University of Washington between 2:20 and 6:10 p.m. on August 29 and between 8:40 and 9:30 a.m. on August 30, 1983.

Participants for the State were Mr. Lloyd Phinney, spokesman, and Dr. Morris Barker, Mr. Bill Wood, and Mr. Kurt Reidinger.

Participants for the Quinault Tribe were Mr. Jim Harp, spokesman, and Mr. Larry Lestelle, and Mr. Tom Cooney. Auditing were Mr. James Jorgensen and Mrs. Vicky L. Ridge-Cooney, Hoh Tribe, and Mrs. Karen Sotomish Harp, Queets Tribe, and Mr. Richard Reich, attorney for the Quinault Tribe.

Participants for the U.S. National Park Service were Mr. Don Cole and Mr. Charles V. Janda.

Major background documents were:

State - Draft of proposed 1983 escapement objectives for fall salmon stocks in the north coastal rivers and Grays Harbor. April 29, 1983, 41 p.

- Stock status report and management objectives for Grays Harbor and the north coastal Washington fall chinook, fall coho, and chum salmon in 1983. August 26, 1983, 15 p.

- Draft updated report on Chinook Allocation Model entitled --- "Allocation

Status Report for Washington Coastal Chinook Stocks," August 25, 1983. 47 pp. plus Appendices.

Tribe - Stock status and pre-season management report for salmon species returning to the Queets, Quinault, and Grays Harbor rivers in fall, 1983. June 15, 1983, 26 p.

- Supplemental report for managing salmon species returning to the Queets River in fall 1983. August 24, 1983, 10 p.

The State's opening statement is essentially reflected in the text on the State's position under Issues.

The Tribal opening statement was as follows:

QUEETS CHINOOK FAB

8-29-83

"A. Mr. Chairman, in many ways I'm sorry this FAB is occurring today because I

thought the matter of implementing a fixed exploitation rate approach was settled nearly a year ago.

B. But even a year ago after you recommended in FAB 82-21 that the exploitation rate and the floor be set within ranges, and you asked the parties to settle on specific numbers within those ranges, the parties could not agree on the specifics. In fact, at that time the state decided to not meet with us to settle on specific values.

C. This year we felt it was best to compromise the separate positions regarding the ranges and use the mid-points of each. The matter still seemed deadlocked.

To facilitate the implementation of the plan with a minimum of dispute, we then decided to adopt the most conservative values for 1983 within the ranges you recommended.

D. However, we now learn that the state is concerned because they feel

non-treaty fishermen are not getting their full opportunity to harvest their share.

Apparently, the state would choose to increase the escapement very substantially over the escapement which would occur through implementation of a strict 40% harvest rate.

This, then, in effect, would defeat the plan by the state's own unilateral action.

Under the state's approach, there can be no implementation of the plan.

E. So, it seems we are here essentially going over the very same ground we covered one year ago -- only the issue has been changed on the surface, to be a wise-use matter.

F. The plan adopted one year ago provided a means, in the midst of the escapement goal debate to manage spawning escapement. The plan was, by its endorsement of the FAB Chairman, seen as the best way to set escapement on an annual basis.

G. The plan also provided a definitive means of establishing the harvestable number of wild chinook annually. Then once these fish are declared harvestable, we must necessarily assume that established allocation principles apply -- otherwise we have an endless debate in wise use, etc.

H. I hope the FAB will deal with the issue for the final time, at least for some time to come."

There followed objections by the State to the Tribe's interpretation of the history of the implementation of FAB 83-21, but it would serve no purpose to belabor the matter herein.

The State then listed points of agreement at the State/Tribal technical meeting held 8/26/83, as follows:

1. The pre-season forecast of 5,500 in-river wild chinook will be used for management in 1983.

2. The fixed in-river harvest rate will 0.40.

3. The "floor" escapement will be 2,500 wild chinook.

4. The minimum mesh size in chinook-directed fisheries will be 8".

5. There will be no in-season terminal-run update fishery.

Points not agreed were listed under Issues herein.

The State then summarized their views regarding the .4 harvest rate and allocation sharing:

1. The Boldt decision says a 50% share for each party - this is assured the Tribe by the State plan.

2. It is not necessary to reduce the .4 harvest to dead fish - the State can choose to utilize part of the non-Indian share as additional escapement.

3. Wastage is not an issue - the additional escapement will merely broaden the probing range which is desirable.

4. The additional escapement will provide additional opportunity in the sport fishery.

The State then requested representatives of the U.S. National Park Service to present their views on management and escapement. Mr. Charles Janda stated:

1. The N.P.S. is fully committed to the salmon resource as an important part of the fauna in their jurisdiction.

2. They presently have no opinion as to MSY escapement, but will be concerned with the issue as their biological staff is expanded under future plans.

3. Their basic view is that large escapements that presumably occurred historically under pristine conditions were not wastage, but rather contributed to the

food chain of all flora and fauna through enrichment, recycling, and direct feeding on carcasses.

The Tribe responded to the State position:

1. The former State escapement goal was 4,200 fish.

2. The former Tribal goal was to attempt to increase escapements relative to the previous cycle years.

3. The new Tribal plan was for probing via a fixed escapement goal of .40-.45 in conjunction with a "floor" between 2,000 and 2,500, and to use the best information available for the near- and long-term in probing with future corrections to the appropriate range.

4. Note that the "floor" for 1983 is 500 above their present estimate of optimum escapement.

5. Through '83, however, 2,200 is the optimum.

6. If the .4 harvest rate was applied to historic years (16 years) there would have been 9 escapements above and 7 below the mean of the present State and Tribal estimates of MSY escapement.

The Tribe responded to the N.P.S. position:

1. The Tribe is pleased that N.P.S. is committed to the salmon resource.

2. The Tribe is and has been equally committed.

3. The Tribe is concerned, however, with the ultimate implementation of N.P.S. goals of returning to "pristine" conditions as defined in N.P.S. reports, since it entails only non-consumptive utilization by man except for subsistence and bartering as in early times. If the goal is actually maximum numbers on the spawning grounds, it implies reduction or elimination of both river and coastal fisheries, commercial and sport.

There followed an exchange of State and Tribal views as to whether the State document on prior interceptions for allocation purposes as determined from the ocean model could be implemented this year. The Tribe stated that they needed more time to review the large document just received August 26. The State stated that a technical meeting should be held in the near future, at the FAB Chairman's recommendation, if necessary, to try to come to agreement and if not, a recommendation on allocation numbers by the Chairman might be requested. The Tribe stated that the real issue is not in the technical details of ocean interception calculations, and that an agreed or recommended ocean catch figure is not needed for the present issue of in-river sharing because the river sport catch is small even under the State's liberalized sport regulations being proposed for 1983.

At this point I agreed to recommend a technical review and interpretation prior to any critical date in the 1983 season if I determine that such information is essential for a recommendation on the major issue of this FAB.

The State then presented a 12-page report entitled "A revision of 'adult fall chinook' river sport catch estimates." The report dealt with the Queets, Hoh, and Quillayute Rivers and included comprehensive tables of escapement and allocations of fall chinook at an overall terminal harvest rate of 0.4 and with the river sport catch rate on age 3 and older at twice the mean rate for the years 1978-1981. The report is appended hereto as Appendix I.

The State explained that the table presents a best estimate of what the 1983 sport catch will be under the proposed liberalized regulations. The total was 104

mature chinook (99 wild; 5 hatchery) for the Queets River, or 22 fish more than would be caught without the increased escapement per the State interpretation of sharing under the 0.4 harvest rate.

The State cited benefits:

1. The portion of the non-Indian share not harvested adds to the escapement.

2. This increase reduces the risk factor in the production of by serving as a cushion in the event of adverse environmental conditions.

3. It will accelerate determination of optimum escapement by broadening the range of escapements.

The Tribe stated they accepted the sport catch figures presented by the State because the small numbers, even with doubled opportunity, are in agreement with the peculiar circumstances of the Queets fall chinook runs that militate against an efficient sport harvest, namely:

1. Fish are available to the sport fishery for only a short period before spawning.

2. The river is frequently out of condition for effective sport fishing.

3. The river is remote from population centers.

4. Accessibility is limited and difficult.

Both parties then presented comparative bar graph figures showing the distribution of escapements that would have occurred in recent years under the State and the Tribal escapement concepts (State analysis, 9 years; Tribal analysis, 16 years). The State's augmented escapement plan resulted in a broader range of probing and in a higher average escapement. The Tribe agreed that the range would be broader by the State allocation method, but stressed the need to consider the harvestable fish lost by the two methods in the event the MSY escapement

proves to be near the mean or near the lower part of the range. The Tribe then presented further figures illustrating yield analyses at various total harvest rates and the probable range that should be probed in the Queets River. Since the figures and the rationale were covered in FAB 82-21 it will not be repeated herein. The conclusion by the Tribe was that the range provided by a 0.4 rate is ample for an efficient probing.

The Tribe then cited FAB 80-24 wherein a non-Indian fishery was recommended to harvest more than their 50% allocation of coho in Grays Harbor because data showed that the Tribal fishery, operating above the non-Indian fishery, could not harvest its full allocation. The same issues of opportunity and wastage were involved, but reversed as to parties, in the Queets situation.

The State responded that the two cases are not directly comparable since wastage

(excess to escapement goal) was an issue in Grays Harbor, but is not in the Queets situation. Further, the Tribe in catching the "surplus" is actually reducing the sport fishing opportunity and quality of experience. The 22 additional sport catch (Table 1, Appendix 1) is 25% of the projected sport catch.

The Tribe responded that the Tribe's intention is not to pre-empt the sport fisherman's opportunity, and this is evident in the relative projected figures -

Projected Queets chinook catches-1983[1]

			Gains or Losses	
	Sport	Tribal	Sport	Tribal
State Plan	99	1177	+22	-951
Tribal Plan	77	2128	-22	+951

---

[1] See footnote (Issue 3) on page 8 for amplification.

The Tribe stated that the above relationship places the burden of achieving strict allocation essentially all upon the Tribe. A minimal benefit to the sport fishery accrues from a massive loss to the Tribe and the additional escapement is over and above the number needed for implementing the agreed probing plan.

Both parties made closing statements as follows:

State

WDF agrees to the probing concept within a 0.40 terminal harvest rate with allocation controlling the harvestable shares. This plan fulfills the requirements of a probing strategy while providing large benefits in terms of opportunity to the sport fishery, with all its aesthetic values. Fish not caught by the sport fishery will not be wasted nor will there be a decline in future production. On the contrary, recent investigations by fisheries workers (Ludwig

and Hilborn, 1983) indicate appropriate strategy in determining spawner-recruit relationships (E.G. Ricker curve) requires that sufficient contrast be generated in stock abundance data before this relationship can be successfully and accurately estimated. It has been clearly demonstrated that the state's approach, which takes into account allocation between user groups will result in a much wider range of spawning escapements, i.e., greater contrast than the tribe's approach and will more easily permit the establishment of optimal spawning escapements. Therefore this plan fulfills both the objective of determining the MSY escapement level and the legal requirements of sharing.

The tribal plan, while meeting their own objectives of maximizing catch and at the same time probing for the MSY escapement, does not address allocation or the legal requirements of sharing. However, applying

the tribal plan does pre-empt the non-Indian opportunity to harvest by reducing that opportunity in a roughly quantifiable way by 22% and furthermore dictates the wise use decisions of the remaining state's share of the harvestable numbers when no damage to the resource can be demonstrated by either party in the event that the remainder goes unharvested. The term unharvested does not equate to unutilized.

The crux of the issue seems to be not that an allocation is due the tribes or the non-Indians but what that allocation amount may be, how it affects terminal sharing and subsequent management options and whether one party can pre-empt another party's share (wholly or in part) without wastage being demonstrated.

CONCLUDING STATEMENT OF JIM HARP
IN FAB83-31 ON QUEETS RIVER
FALL CHINOOK

General

The issue that we are faced with is similar to the matter we addressed one year ago. The key question is - how are spawning escapements for Queets fall chinook going to be managed. In fact, that question has been a perennial one for this stock since 1977.

Many of the same concerns were raised a year ago. We've heard the same rebuttals, the same questions, and many of the same analyses. The only difference this year is the added matter of allocation - this time interwoven by the State with the escapement issue in an attempt to keep them indistinguishable and inseparable. Nevertheless, the issues of spawning escapement goals and allocation are distinct, and have been throughout the U.S. v. Washington case -- and you, Mr. Chairman, should keep them distinct.

FAB 82-21

The matter of escapement goals was addressed in FAB-82-21 one year ago. The Tribe proposed a probing approach to deliberately vary spawning escapements in proportion to run size. The Tribe has shown how such a plan will result in a wide range of escapements, more than spanning the range between the optimum escapement using existing data and the State's proposed goal of 4,200. That FAB ended with you recommending that a fixed exploitation rate of 0.40 be adopted for 1982; your recommendation most clearly identified this rate as an exploitation rate and as such defined both the escapement and harvestable numbers at any run size. The critical point in all of this is a specific harvest rate of 40%.

Our 1983 Plan

We have developed a plan for 1983 which is consistent with your FAB 82-21 approach. Our plan is, in fact, the only plan before

the FAB which in reality implements a probing plan with an in-river exploitation rate of 0.40.

Agreement by State on Exploitation Rate

It is not insignificant to this proceeding that the State has agreed to an exploitation rate of 0.40 for 1983. In a letter from Dr. Morris Barker to Mr. Larry Lestelle dated July 19, 1983, Morris stated:

> "Mr. Hartt's implemented recommendation were based ...." (see 4th paragraph on page 2)

Then the State's recent stock status report dated August 26, 1983 clearly identified on page 8 that 40% of the 1983 run size is allowable harvest and is expected to be harvested.

However, the dispute here is over the fact that the Tribal plan provides for the full harvest of those fish while the State's does not.

Allocation Follows after Harvestable Numbers Set

Clearly, there must be a way to define the number of harvestable fish. The exploitation rate does that.

The next step is to divide those fish in half between the parties, that is, allocation of the resource. The real dispute in this FAB appears to occur at the next step. If the State is unable to catch their half of the fish, or chooses for any reason not to do so, then it claims it is free to pre-empt the harvest of those fished by the Tribe. That is not our view of the applicable allocation rules. The Court and past FAB's have determined that when one party can't catch their share, then the other party is free to do so. Furthermore, in our situation, a harvest of 40% of the terminal run is necessary to implement a critical part of the

plan -- achievement of a fixed exploitation rate. Our plan achieves this objective. The State's does not.

Sport Fishery

We think it is clear that even under the State's liberalized sport regulations, there is a projected sport harvest of only 99 fish. That is the State's best estimate. However, we are willing to agree with an even more liberal allowance of up to 200 fish. But no evidence has been provided to indicate that even in the absence of a treaty river fishery could the sport fishery catch 200 fish.

In Summary

In summary, no evidence has been presented to show that a conservation problem would result if the full harvest rate of 0.40 is achieved. In fact, both parties have agreed that escapements can go down to 2500. The escapement that results in 1983 from the exercise of a full 40% harvest results in an escapement of 3300, which according to the

available data is higher than the MSH escapement.

I'd like to repeat that no evidence has been given showing a reasonable likelihood that the sports fishery can harvest the remaining non-treaty share based on the State's prior interception estimates. In fact, it is the State's best estimates that only a catch of about 100 fish would occur.

In conclusion, it appears that the State's proposal is, at best, an attempt to put the spawning escapement back in the vicinity of their former goal of 4200 and, at worst, is an attempt to prevent the Tribe from catching a substantial number of fish while providing little or no measurable benefit to non-treaty fishermen.

Both parties then made motions as follows:

State:

That the tribal chinook fishery be limited to its 50% allocation and that the Board recognize the right of the state to exercise its judgment for the wise use of its in-river share of the harvest to maximize the recreational opportunity and that the unharvested proportion of that share be passed on to the spawning grounds as part of the State plan to more rapidly resolve the MSY escapement level by probing over a wide range of potential escapements.

Tribal:

Mr. Chairman, we move that you reaffirm that the in-river exploitation rate of 0.40 is biologically appropriate and that you determine that there is a specific number of harvestable wild chinook for 1983, which is 2200 fish at a run size of 5500.

And secondly, we request that the Chairman determine the maximum reasonable likely number of fish that will be caught by

the non-treaty sport fishermen. We believe that no evidence has been presented that indicates they can catch over 200 fish -- even if there were no treaty fishery at all.

Last, I should remind you that we feel the State's estimates of prior interceptions are not relevant to the issues before this FAB. However, if you come to find that those estimates are important in your opinion and that they will form a significant factor in your recommendations, then we request that you tell us and allow us to schedule a technical meeting with the State before the ultimate conclusion of this FAB.

Neither motion was seconded. Both parties requested a recommendation from the chairman that responds to the items in the respective motions.

Adjournment was at 0930.

Post-FAB

The recommendations cited earlier were phoned separately to the parties on Friday,

September 9. It should be noted that FAB's on similar issues were held for the Hoh River (83-33) and the Quillayeute River (83-35) on October 30 and 31. Also FAB's 30, 32, and 34 dealing with coho management in the respective rivers were chaired by Dr. Gil Pauley on the same dates. The two chairmen conferred on issues and recommendations because there is some contingency between management plans for the two species.

Appendices I-III attached.

Supreme Court, U.S.
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No. 85-535

IN THE

SUPREME COURT

OF THE
UNITED STATES

OCTOBER TERM, 1985

QUINAULT INDIAN NATION, QUILEUTE INDIAN TRIBE, and HOH INDIAN TRIBE,

Petitioners,

v.

STATE OF WASHINGTON, et al.,

Respondents.

On Writ Of Certiorari To The United States Court of Appeals For The Ninth Circuit

RESPONSE TO PETITION FOR WRIT OF CERTIORARI

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Respondents.

On Writ Of Certiorari To The United States Court of Appeals For The Ninth Circuit

RESPONSE TO PETITION FOR WRIT OF CERTIORARI

COUNTERSTATEMENT OF THE QUESTIONS PRESENTED

1. Are treaty Indians entitled to take in excess of the maximum 50% tribal opportunity share established by this Court in *Washington v. Washington State Commercial Passenger Fishing Vessel Association,* 443 U.S. 658 (1979), merely because the state has dedicated its

share to a less efficient sport fishery which may not result in a full non-tribal harvest?

2. Was the District Court's order in this case a "final decision" within the meaning of 28 U.S.C. § 1291 in view of the fact that it resolved the foregoing question in a manner which conflicts with this Court's decision in *Washington v. Washington State Commercial Passenger Fishing Vessel Association, supra?*

COUNTERSTATEMENT OF THE CASE

The respondents are unable to accept petitioners' statement of the case. The extent of distortion in that statement of the case seems to us to be extreme. Moreover, a great deal of extraneous information has been included therein. A neutral and more efficient statement of the case is set forth in the Ninth Circuit panel's opinion:

> The issues presented on this appeal are tied to the question of salmon escapement on the Queets, Hoh, and Quillayute Rivers in northwestern Washington. In 1982 and 1983, the district court's Fishery Advisory Board (FAB) considered a dispute over the appropriate number of Fall Chinook that should be allowed to escape the in-river fisheries and spawn. The Tribes argued that fewer spawners were necessary to produce a Maximum Sustained Yield (MSY) than the number of spawners insisted upon by the state.
>
> In 1982, the FAB developed an interim, data-gathering or "probing plan" to aid in determining the escapement levels necessary to sustain optimum yield. FAB 82-21. Under the plan, a fixed catch-rate of 40% of the run was adopted. As fish density varies from year to year, the fixed exploitation rate was designed to produce a varying range of actual numbers of spawners. These data would then be used by resource managers to determine the escapement levels necessary to achieve MSY.
>
> This fixed-rate exploitation plan was developed without State cooperation, and the State did not challenge the approach in district court. The

allocation between Indian and non-Indian fisheries within the 40% exploitation rate was not, however, a factor in the 1982 plan

In 1983, the court's technical advisor issued a series of separate recommendations for the Fall Chinook season on the Queets, Hoh and Quillayute Rivers. FAB Nos. 83-31, 83-33, 83-35. The recommendations concluded that to effectively probe optimum yield, fish determined to be unharvestable by one party must be available for harvest by the other party in order to assure a fixed catch. The advisor noted that the State's claimed right to assign part of its allocation to non-harvest recreational uses would result in exploitation of less than 40% of the run, thereby undermining the FAB's probing plan.

This results from the nature and location of the fisheries. The State hook and line sports fishery is located upstream from the tribal commercial net fishery. Thus, harvestable fish not caught by the sports fishery necessarily result in greater escapement, undermining the fixed catch goal.

Subsequently, the State filed a request for review of the recommendation in the district court. The State's primary objection was that the interim plan would authorize a tribal catch exceeding its 50% allocation. The State argued that the plan would infringe its opportunity to catch 50% of the harvestable run since a greater tribal catch necessarily reduces the number of fish available to the sports fishery.

ARGUMENT

1. The decision of the court of appeals is consistent with and protective of the rule of *Passenger Fishing Vessel.*

The so-called Stevens Treaties reserved to the signatory tribes a "right of taking fish." The pertinent language provides:

> "The right of taking fish, at all usual and accustomed grounds and stations, is further secured to said Indians in common with all citizens of the Territory * * *"

In *Washington v. Washington State Commercial Passenger Fishing Vessel Association*, 443 U.S. 658 (1979), this court interpreted the "in common with" language of the foregoing treaty provision to authorize a maximum (but not a minimum) allocation of 50% of the harvestable fish to treaty Indian fishers, saying:

> "Only then did [the District Court] determine that the Indians present day subsistence and commercial needs should be met, subject, of course, to the 50% ceiling. * * *
>
> "It bears repeating, however, that the 50% figure imposes a maximum but not a minimum allocation. * * * Accordingly, while the maximum possible allocation is fixed at 50%, the minimum is not; the latter will, upon proper submissions to the District Court, be modified in response to changing circumstances."

443 U.S. at 686. The merits of the issue sought to be raised by the petition here were thus dealt with directly and fully by this Court.

The Ninth Circuit's reversal of the District Court did nothing more than preserve the integrity of this Court's decision in *Passenger Fishing Vessel, supra*. The Court Advisor's invalidated plan to allow tribal harvest of the Non-Indian share ran clearly afoul of this Court's earlier decision. It also embodied a "self-fulfilling prophecy" element which could well have locked non-treaty sport fishers into a hopeless cycle of endlessly reduced fishing opportunity. This cycle or trend would have followed from the very fact that future non-treaty sport fishing allocations were predicated on actual non-tribal harvest under a system which drastically reduced non-tribal opportunity at the very outset. The supposition that non-tribal sport fishing effort would somehow increase in a context where sport fishing *opportunity* was artificially reduced by a federal court order simply made no sense to those charged by state law with providing that opportunity and, apparently the Ninth Circuit panel agreed.

2. Because the District Court's post-judgment order resolved the central issue of law in a manner violative of this court's holding that Stevens Treaty Tribes enjoy a maximum allocation of 50% of the harvestable fish, it was a final decision appealable under 28 U.S.C. § 1291.

In the Circuit Court, the Appellee Tribes (Petitioners here) asserted that the court below lacked jurisdiction since the District Court had failed to certify its order (approving the challenged plan) as appealable under FRCP 54(b) or 28 U.S.C. § 1292(b).[1] The thrust of their claim there (and here) seems to be that the District Court's order appealed from is equivalent to a partial decision rendered *prior* to judgment on the merits.

The Ninth Circuit panel dismissed the jurisdictional argument, holding that this particular post-judgment order was, quite simply, a "final decision" which was appeallable under 28 U.S.C. § 1291.[2] In so holding, the Ninth Circuit panel said:

---

[1] 28 U.S.C. § 1292(b) reads as follows:
When a district court judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order. The Court of appeals which would have jurisdiction of an appeal of such action may thereupon, in its discretion, permit an appeal to be taken from such order, if application is made to it within ten days after the entry of the order: Provided, however, That application for an appeal hereunder shall not stay proceedings in the district court unless the district judge or the Court of Appeals or a judge thereof shall so order.

[2] 28 U.S.C. § 1291 reads as follows:
The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court. The jurisdiction of the United States Court of Appeals for the Federal Circuit shall be limited to the jurisdiction described in sections 1292(c) and (d) and 1295 of this title.

> "It is sometimes appropriate to give the finality requirement a practical rather than a technical construction. * * * '[F]inal * * * does not necessarily mean the last order possible to be made in a case.' *Gillespie v. United States Steel Corp.*, 379 U.S. 148, 152 (1964).
>
> "This is particularly true when post-judgment orders are involved. The policy against and the probability of piecemeal review is not as decisive a consideration after judgment as before judgment since the underlying dispute is already settled. * * * Moreover, unless such orders are found final, there is often little prospect that further proceedings will occur to make them final." [Citation Omitted]

Petition, Appendix A at 5. The soundness of the Ninth Circuit's rationale seems unassailable in the context of this particular appeal. As became apparent when the panel reached the merits, the post-judgment order in this case did utter violence to this Court's well-considered opinion in *Passenger Fishing Vessel*. Had the order *not* been treated as a final decision under 28 U.S.C. § 1291, the non-tribal treaty beneficiaries might have remained saddled with an unreviewable decision denying them their treaty-protected opportunity to share equally in the harvest of available fish.

CONCLUSION

For the reasons foregoing, the Respondents respectfully request that this Court enter an appropriate order denying the Petition for Certiorari.

Respectfully submitted,

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No. 85-535

Supreme Court, U.S.
FILED
DEC 19 1985
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CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1985

QUINAULT INDIAN NATION, ET AL., PETITIONERS

v.

STATE OF WASHINGTON, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the State of Washington may challenge the continuation of a five-year experiment, designed to probe for the maximum sustained harvest and escapement levels for fall chinook on the Queets, Hoh, and Quillayute Rivers, on the ground that the fixed harvest premise of the probing experiment infringes on the State's right to dedicate its share of the harvestable runs to non-harvest uses.

2. Whether the court of appeals erred by construing the district court's decision as an appealable final order.

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A12) is reported at 761 F.2d 1404. The opinion of the district court (Pet. App. C1-C2) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on May 28, 1985, and a petition for rehearing was denied on June 28, 1985 (Pet. App. B1). The petition for a writ of certiorari was filed on September 25, 1985. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. This case involves one facet of the longstanding controversy between treaty and nontreaty fishermen over the management and allocation of Pacific Northwest anadromous fish pursuant to the so-called "Stevens Treaties."[1]

[1]Treaty of July 1, 1855 and Jan. 25, 1856 (Olympia), United States-Qui-nai-elts-Quil-leh-ute Indians, 12 Stat. 971 *et seq.*; Treaty of June 9, 1855 (Yakimas), United States-Yakima Indians, 12 Stat. 951 *et seq.*;

See *United States* v. *Washington*, 384 F. Supp. 312 (W.D. Wash. 1974), aff'd, 520 F.2d 676 (9th Cir. 1975), cert. denied, 423 U.S. 1086 (1976), further proceedings, 459 F. Supp. 1020 (W.D. Wash.), aff'd, 573 F.2d 1123 (9th Cir. 1978), substantially aff'd *sub nom. Washington* v. *Washington State Commercial Passenger Fishing Vessel Ass'n (Fishing Vessel)*, 443 U.S. 658 (1979).

In particular, this case involves the question of salmon escapement on the Queets, Hoh, and Quillayute Rivers in northwestern Washington. The problem of proper spawning escapement is a complex one: both fisheries biologists and past court decisions have recognized that, in limited instances, too many spawners can be as harmful to the reproductive success of a run as too few. See, *e.g.*, *Fishing Vessel*, 443 U.S. at 664 ("fish runs may be harmed by harvesting either too many or too few of the fish returning to spawn").

In 1982 and 1983, the district court's Fishery Advisory Board (FAB) (see Pet. 7 & n.4; Pet. App. A3 n.1) was presented with a dispute between petitioners and the State of Washington concerning the appropriate number of fall chinook that should be allowed to escape the in-river fisheries for spawning purposes. In general, petitioners and the State disagree over the number of spawners necessary to produce a maximum sustained harvest. In late 1982, the FAB developed a five-year interim plan designed to "probe" for the escapement level that would yield the maximum sustained harvest. The interim plan also would provide data

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Treaty of Dec. 26, 1854 (Medicine Creek), United States-Nisquallys Indians, 10 Stat. 1132 *et seq.*; Treaty of Jan. 26, 1855 (Point No Point), United States-S'Klallams Indians, 12 Stat. 933 *et seq.*; Treaty of Jan. 31, 1855 (Neah Bay), United States-Makah Tribe, 12 Stat. 939 *et seq.*; Treaty of Jan. 22, 1855 (Point Elliott), United States-Dwamish Indians, 12 Stat. 927 *et seq.*

to aid in evaluating the perennial disputes that arise between tribal and state biologists. This probing plan was in the nature of an experiment: a fixed 40% of the fall chinook in the three rivers involved would be harvested each year, provided that conservatively-established minimum spawning escapement levels were met to ensure conservation of the chinook stocks. Because the sizes of the runs over the next few years were expected to vary, the constant 40% harvest rate and concomitant 60% escapement rate were designed to produce a range of actual numbers of spawners — which could then be compared to year-by-year estimates of viable offspring, providing resource managers with some hard data in their attempts to estimate the optimal number of spawners. See Pet. App. D3. This interim plan was developed with virtually no cooperation from the State of Washington, and the State did not contest the plan in district court.[2]

In 1983, however, the State objected to the continued implementation of the FAB interim plan. Specifically, the State argued that harvestable fish must be split 50-50 between the treaty fishery and the in-river non-Indian sports fishery, even though the sports fishery cannot catch more than a fraction of the State's harvestable share. Under the State's view, the State may devote its share of the harvestable fish to "non-harvest" uses, including extra escapement to improve the runs, to add to the food chain of wild animals, and to provide additional "opportunity" to sport fishers. The State thus argued that the 40% harvest rate must be decreased (and the 60% escapement rate increased) to the degree that the non-Indian river sport fishery is unable to harvest its share. Pet. App. D1-D2 (Queets River).

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[2]The United States did not participate as a formal party in the 1982 FAB proceeding.

Petitioners, on the other hand, argued that the 40% fixed harvest rate was an essential premise of the FAB plan for probing for maximum sustained yield and escapement levels. Pet. App. D3. Petitioners also contended that, within the 40% harvest rate, fish determined unharvestable by one party may legally be harvested by the other. *Ibid.* Petitioners argued that, if they were not allowed to catch that portion of the harvest that the non-Indian sports fishery is unable to catch, the 40% harvest rate necessary for purposes of the FAB experiment would not be achieved. *Id.* at D13.

The district court's technical advisor, in his reports on the 1983 fall chinook season on the Queets, Hoh, and Quillayute Rivers, recommended that the 40% harvest rate be construed and implemented in accordance with petitioners' position, *i.e.*, that within the 40% harvest rate fish determined to be unharvestable by one party could be harvested by the other party. Pet. App. D4-D5. The advisor noted that the 40% harvest rate, along with a "floor" escapement of 2,500 fall chinook, "is an integral part of a management plan which protects the resource and effectively probes towards [maximum sustained yield] escapement" (*id.* at D5). The advisor also noted that while petitioners' plan would reduce the number of fish available for sports fishermen, the numerical reduction in the estimated sports catch would be minimal compared to the estimated loss to tribal fishermen under the State's plan (sport fishermen loss of 22 fish under petitioners' plan for the Queets River compared to an estimated tribal loss of 900 fish under the State's plan). *Id.* at D6. Although the advisor did not accept the State's proposed plan, he did earmark for the sports fishery more than twice the number of fish that the State had estimated could be caught by sportsmen. See *id.* at D8.

In response to the advisor's recommendation, the State filed a "Request for Determination" with the district court, seeking a declaration that the non-Indian fishery cannot be

curtailed simply to achieve a level of catch considered desirable by the district court's technical advisor for scientific and economic purposes. On December 19, 1983, the district court entered a two-page order (Pet. App. C1-C2) adopting the advisor's recommendation.

2. The State appealed the district court's decision without seeking certification under Fed. R. Civ. P. 54(b) or 28 U.S.C. 1292(b). On June 5, 1984, the court of appeals denied petitioners' motion to dismiss the appeal for lack of jurisdiction (Pet. App. B2). The court of appeals reaffirmed this ruling in its decision on the merits (*id.* at A4-A7). The court held that the principle of finality should be applied with greater flexibility in the context of post-judgment orders, because the danger of piecemeal review is lessened once the underlying dispute has been resolved (*id.* at A5). The court also concluded that the State's appeal presented the only opportunity for meaningful review, because, by definition, the FAB plan approved by the district court would always be an "interim" plan (*id.* at A6).

With respect to the State's contention that the FAB plan conflicted with this Court's decision in *Fishing Vessel* insofar as that case held that the tribal catch may not exceed 50% of the harvestable fish, the court of appeals ruled that the 50% figure "should be viewed as a ceiling only when there is actual competition for use of the resource" (Pet. App. A10). If the non-treaty fishers choose not to "use" their share of the resource, the court held, the Indians should be permitted to take the otherwise unharvestable portion unless doing so would interfere with conservation. *Ibid.* In the present case, however, the court concluded that the State is in fact "using" its share of the resource by dedicating it to the sports fishery in order to provide a "sustained recreational experience" (*id.* at A11). Because the fixed 40% harvest rate called for by the FAB probing plan reduced the number of fish available for sports fishermen, the court of appeals held that the plan infringed on the

State's treaty rights despite the fact that the estimated decrease in the fish available for sportsmen was minimal.[3] The court ordered that, in the future, the FAB probing plan "must respect the State's right to allocate up to 50% of any harvestable run to the sports fishery without diminution for failure to harvest all available fish" (*id.* at A12).

ARGUMENT

Management of the Pacific Northwest anadromous resources and effectuation of the fishing rights of Indian and non-Indian fishermen present numerous complex problems, both technical and equitable. In the present action, a dispute arose between petitioners and the State over the level of escapement necessary to provide for maximum sustained harvest of fall chinook on the Queets, Hoh, and Quillayute Rivers. In order to resolve that factual dispute, a five-year experiment was undertaken under the auspices of the FAB to collect data and probe for the optimal escapement and harvest levels. Because the United States believed the FAB plan should be allowed to run its course, and because the plan was premised on a fixed 40% harvest rate, the government opposed the State's attempt to undercut the experiment after only one year of operation by raising after-the-fact "treaty allocation" issues. The court of appeals' decision, however, has altered the nature of the FAB probing experiment by requiring an adjustment to the plan to allow the State to allocate its share of the harvestable runs to the sports fishery. While we believe this ruling is inimical to the continuation of the five-year FAB plan, the

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[3]Although the court agreed with petitioners that waste of harvestable fish should be avoided, it held, in light of the uncertainty as to the maximum sustained harvest and escapement levels, that "the Tribes' contention that the State's non-harvest-use is waste is premature" (Pet. App. A11). At the same time, however, the court also held that the policy against waste must give way to the State's right to dedicate a portion of its allocation to the "inefficient sports fishery" (*ibid.*).

decision below does not conflict with any decision of this Court and does not squarely present any issue of broad importance warranting review by this Court.

1. As an initial matter, we note that the decision below is internally inconsistent: the court of appeals has agreed that the FAB five-year plan, designed to develop data and to probe for the maximum sustained harvest level of fall chinook on the rivers in question, should continue, but that it must be conducted prospectively in such a manner as to allow the State to dedicate its full share of the harvestable runs to the admittedly inefficient sports fishery for non-harvest uses. Yet the fixed 40% harvest rate, which is "an integral part of [the] management plan which * * * effectively probes toward [maximum sustained yield] escapement" (Pet. App. D5), cannot be realized unless petitioners are permitted to harvest the fish that cannot be harvested by the sports fishery. The court's invalidation of the FAB interim plan is particularly troublesome in view of the State's failure to contest the probing experiment in 1982 when the plan was formulated.

2. Nevertheless, we believe that further review of this controversy is not warranted. The court of appeals' decision was rendered in the context of a dispute over the best method by which to resolve the factual question of the maximum sustained harvest of fall chinook on the rivers in question. Until that question is settled, as noted by the court of appeals (Pet. App. A11), petitioners' contention that the State's non-harvest uses constitute waste is premature. An adequate record that demonstrates, as a matter of fact, that the State's dedication of its full share of the harvestable fish to the sports fishery leads to over-escapement of chinook salmon to the spawning grounds and consequential wastage of fish is a necessary predicate to petitioners' contention that they should be permitted to harvest fish in excess of their harvestable share. The court of appeals has remanded

the case to the district court with instructions to develop a plan that will produce the necessary data. *Id.* at A12.

Thus, the broader issue of "foregone opportunity" is not squarely presented in this case.[4] In some instances, the State may have legitimate non-harvest uses that do not result in wastage; in other instances, the State may not have a factual basis for a claim that its failure to harvest the non-Indian share of the harvestable fish is a legitimate "use" of the type protected from infringement. In the present case, the factual record is lacking with respect to the capability of the sports fishery, the extent of the ocean catch, and the issues of wastage and optimal escapement. Because the facts are not yet sharply focused, the underlying legal questions have not been fully defined.[5] We therefore believe that the present

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[4]In contrast, the Ninth Circuit has recently affirmed the "foregone opportunity" doctrine in *United States* v. *Washington*, 774 F.2d 1470 (1985), which involves Puget Sound salmon. In that case, the United States supported the tribes' position that the State should not receive an "equitable adjustment" when tribal fishermen catch more than 50% of the harvestable runs, as long as the fish were known to be *clearly* surplus to spawning escapement needs and would otherwise have been uncaught by the non-Indian fisheries. The Ninth Circuit generally agreed with the Indians, holding that no equitable adjustment is due when a party catches fish in excess of its share if it is shown that "(1) the fish taken in excess of its share were identified in-season and (2) the other side had notice that the excess fish would be harvested." 774 F.2d at 1480.

We note that, unlike the present case, in which the dispute is between the upstream nontreaty sports fisheries and the tribal fisheries located at the mouths of the rivers, the dispute in the Puget Sound case was between nontreaty commercial fishermen operating in the marine areas of Puget Sound and Indian fishermen who fish in freshwater and the inland areas where the salmon return to spawn (see 774 F.2d at 1473). It remains to be seen — perhaps after the collection of data from a revised FAB experiment in the instant case — how the two decisions will be reconciled.

[5]Correspondingly, while the matter is not entirely free from doubt, we believe the court of appeals' decision should not be interpreted as significantly curtailing the legal contentions that could otherwise be made in the context of a more fully developed factual showing.

case is an inappropriate vehicle by which to address the questions where, or under what circumstances, a tribe may harvest more than 50% of a harvestable fish run.[6]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[6]Petitioners also argue (Pet. 15-19) that the court of appeals' failure to dismiss the appeal in light of the absence of a certification pursuant to Fed. R. Civ. P. 54(b) by the district court warrants review by this Court. Although we argued below that the district court's order was not final in light of the fact that further proceedings were contemplated by the parties, we do not believe the court of appeals' contrary interpretation of the order merits review.

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